APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 06-1456

[Filed December 28, 2007]

R.M. INVESTMENT CO., doing business as Trappers Lake Lodge and Resort,	)
Plaintiff - Appellant,	)
v.	)
UNITED STATES FOREST SERVICE; DON G. CARROLL, in his official capacity as White River National Forest Supervisor,	)
Defendant - Appellee.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. NO. 04-cv-2314-REB)

Submitted on the briefs:*

Tracy A. Oldemeyer, Cline, Williams, Wright, Johnson & Oldfather, L.L.P., Fort Collins, Colorado, for Plaintiff - Appellant.

Matthew J. McKeown, Acting Assistant Attorney General, Washington, D.C., Troy A. Eid, United States Attorney, and Kevin Traskos, Assistant United States Attorney, Denver, Colorado, Ellen Durkee and M. Alice Thurston, Attorneys, United States Department of Justice, Environment & Natural Resources Division, and Kenneth Pitt, Office of the General Counsel, Department of Agriculture, and Kenneth Pitt, Office of the General Counsel, Department of Agriculture, Washington, D.C., for Defendants - Appellees.

Before **HARTZ**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **TYMKOVICH**, Circuit Judge.

HARTZ, Circuit Judge.

R.M. Investment Co., doing business as Trappers Lake Lodge and Resort (Trappers), appeals a district-court order vacating as moot its prior order setting aside a decision by the United States Forest Service that had revoked Trappers' permits to operate a lodge and an outfitter-guide service. Trappers also

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

appeals an order denying its request for attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. We affirm.

I. BACKGROUND

Trappers operated a lodge and outfitter-guide activities on land in the White River National Forest in Colorado. The Forest Service granted Trappers the necessary permits for this use of national-forest land. In June 2003 the Forest Service issued Trappers a Notice of Noncompliance asserting that it was in violation of some of the terms and conditions of the permits. Trappers responded three days later, stating why it believed itself to be in compliance. The Forest Service neither acknowledged the response nor took any further action for nearly a year. On May 26, 2004, it issued a Notice of Immediate Suspension based on its "immediate concern for environmental and public safety." Aplt. App. at 125. On June 7 it issued a Notice of Noncompliance and Opportunity to Cure, giving Trappers until August 15 to take corrective action itemized in the notice. Trappers' response of June 16 crossed in the mail with a June 15 Notice of Revocation, which set forth additional alleged permit violations. The revocation notice required Trappers to remove its improvements from the forest land.

Trappers pursued an administrative appeal but was unsuccessful. It then sought review under the Administrative Procedures Act (APA) in the United States District Court for the District of Colorado. *See* 5 U.S.C. §§ 701-706. Relief available under the APA does not include damages. *See id.* § 702.

On October 7, 2005, while the case was pending in district court, Trappers sold its White River assets but did not advise the court. On October 19, 2005, the court entered an order setting aside the Notice of Revocation because the Forest Service had violated proper procedure in revoking the permits. The court also granted Trappers its costs but denied attorney fees to Trappers on the ground that the Forest Service's position was substantially justified. On November 3, 2005, the Forest Service moved to vacate the judgment, contending that Trappers' sale of its property had mooted the case before the district court issued its order. The district court granted the motion on September 5, 2006, dismissing the case as moot and vacating the October 2005 judgment.

Trappers appeals, arguing that the district court erred in determining that the case is moot. It also challenges the district court's denial of its request for attorney fees under the EAJA, asserting that the Forest Service's position was not substantially justified.

II. DISCUSSION

A. Mootness

"Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, (1990). A federal court lacks jurisdiction unless "a litigant [has] suffered, or [is] threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Id.* To qualify as a case fit for federal-court

adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona,* 520 U.S. 43, 67, (1997) (internal quotation marks omitted). On the other hand,

> [w]e will not dismiss [a case] as moot if (1) secondary or 'collateral' injuries survive after resolution of the primary injury; (2) the issue is deemed a wrong capable of repetition yet evading review; (3) the defendant voluntarily ceases an allegedly illegal practice but is free to resume it at any time; or (4) it is a properly certified class action suit.

Riley v. INS, 310 F.3d 1253, 1257 (10th Cir.2002) (internal quotation marks omitted). "We review de novo the question of whether a case is moot." *Unified Sch. Dist. No. 259 v. Disability Rights Ctr. of Kan.,* 491 F 3d 1143, 1147 (10th Cir.2007).

Trappers raises several contentions why its district-court action is not moot. First, it contends that its effort under the APA to vindicate its rights is functionally the same as a civil-rights suit for nominal damages under 42 U.S.C. § 1983. It argues that because such a § 1983 suit is justiciable, *see O'Connor v. City & County of Denver,* 894 F.2d 1210, 1215-16 (10th Cir.1990), so should be the present action. It quotes the following recent statement by this court: "It may seem odd that a complaint for nominal damages could satisfy Article III's case or controversy requirements, when a functionally identical claim for declaratory relief will not. But this Court has squarely so held." *Utah Animal Rights Coal. v. Salt Lake City*

Corp., 371 F.3d 1248, 1257 (10th Cir.2004) (footnote omitted). That statement, however, does not support, but undermines, Trappers' contention. The issue in *Utah Animal Rights Coalition* was whether we should continue to recognize the prospect of nominal damages as sufficient to continue a case or controversy that would otherwise be moot. We followed our precedent saying that it would suffice. Rather than saying that nominal damages are irrelevant, we said that they could be dispositive. Take away the nominal damages in that case and no case or controversy remained. Because Trappers has no claim for nominal damages, it cannot rely on nominal-damages cases to overcome mootness.

Along the same lines, Trappers contends that a judgment against the Forest Service will serve the public good by proclaiming the Forest Service's misconduct and deterring future such behavior. It quotes this court's statement that "[t]he core question in mootness inquiry is whether granting a present determination of the issues offered ... will have some effect in the real world." *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1266 (10th Cir.1999) (internal quotation marks omitted). Under that standard, it suggests, deterrence is a real-world effect that makes the case justiciable. The real-world effect, however, must be on the legal relationship between the parties to the case. "The touchstone of the mootness inquiry is whether the controversy continues to touch the legal relations of parties having adverse legal interests in the outcome of the case...." *Wirsching v. Colorado*, 360 F.3d 1191, 1196 (10th Cir.2004) (internal quotation marks omitted). To be justiciable, a case must seek to "redress a cognizable Article III

injury," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107, (1998), and the injury that *others* may suffer from future similar wrongdoing is not such an injury. "Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them." *Lewis*, 494 U.S. at 477, (internal quotation marks omitted). Accordingly, in *Steel Co.* the Supreme Court rejected the proposition that the prospect of deterring future harm by the defendant sufficed to overcome mootness. *See* 523 U.S. at 106-07.

Trappers also contends that it has suffered and will suffer collateral consequences that preclude mootness. It states that mootness will preclude it from obtaining reimbursement of its attorney fees under the EAJA. But "a claim of entitlement to attorney's fees does not preserve a moot cause of action," although "the expiration of the underlying cause of action does not moot a controversy over attorney's fees already incurred," *Dahlem ex. rel Dahlem v. Bd. of Educ. of Denver Pub. Schs.*, 901 F.2d 1508, 1511 (10th Cir. 1990) (citations omitted). Trappers further notes that it incurred other expenses in pursuing its claim; but we fail to see the relevance of that fact, because it has not sought damages and could not obtain any judicial relief from those expenses.

As an additional collateral consequence, Trappers alleges injury to its reputation. But "the moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review," *Spencer v. Kemna*, 523 U.S. 1, 8-9, (1998) (internal quotation marks omitted); *see id.* at 16 n.8, although we note, as discussed at length in *Spencer*, that the

impact of this proposition has been diminished in the criminal context, where the Supreme Court has presumed that a conviction carries collateral consequences, *see id.* at 9-13. Trappers has failed to show that it has suffered a stigma that will affect its legal rights. At most, it speculates that the Forest Service's ruling may be a factor in some future adverse decision against it. That possibility does not create a case or controversy. *See id.* at 14-16.

Finally, Trappers appears to suggest that its claim should not be deemed moot because the event that created mootness – its sale of its assets – was forced upon it by the Forest Service. The Forest Service ruling, however, required *removal,* not *sale,* of the assets. Moreover, the "force" imposed on Trappers by the Forest Service was no more than an adverse decision subject to judicial review, and Trappers could have sought a stay of the agency's directive pending the district court's ruling. *Cf. Am. Book Co. v. Kan. ex rel. Nichols,* 193 U.S. 49, 52 (1904) (Compliance with judgment rendered case moot. "It makes no difference that plaintiff in error 'felt coerced' into compliance. A judgment usually has a coercive effect, and necessarily presents to the party against whom it is rendered the consideration whether it is better to comply or continue the litigation").

B. Attorney Fees

As we previously noted, "the expiration of the underlying cause of action does not moot a controversy over attorney's fees already incurred." *Dahlem,* 901 F.2d at 1511; *accord Citizens for Responsible Gov't State Political Action Comm. v. Davidson,* 236 F.3d

1174, 1183 (10th Cir.2000). The EAJA requires a court to award a prevailing party its attorney fees and other expenses incurred in a proceeding "brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The burden to demonstrate substantial justification is on the government. *Hackett v. Barnhart*, 475 F.3d 1166, 1172 (10th Cir.2007). We review for an abuse of discretion a district court's determination that the government's position was substantially justified. *See id.* In doing so, we evaluate whether its position was reasonable in law and fact. *See id.* "The government's position can be justified even though it is not correct." *Id.* (internal quotation marks omitted).

The district court held that the Forest Service's position was substantially justified. We affirm the district court's denial of an EAJA award.

III. CONCLUSION

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Case No. 04-cv-02314-REB-BNB

[Filed September 5, 2006]

R.M. INVESTMENT CO.,d/b/a TRAPPERS LAKE LODGE & RESORT,	)
Plaintiff,	)
v.	)
UNITED STATES FOREST SERVICE, and DON G. CARROLL, in his official capacity as White River National Forest Supervisor,	)
Defendants.	)

ORDER VACATING JUDGMENT

Blackburn, J.

This matter is before me on the **Defendants' Motion to Vacate Judgment Based on Mootness** [# 26], filed November 3, 2005. The plaintiff has filed

a response, and the defendant has filed a reply. I grant the motion.

FED.R.CIV.P. 59 provides that a party may move "to alter or amend a judgment" in a motion filed within ten days of the judgment. Rule 59 permits a court to "open the judgment if one has been entered, ... make new findings and conclusions, and direct the entry of a new judgment." Rule 60 provides that a court may relieve a party from a final judgment based on various reasons, including "newly discovered evidence which by due diligence could not have been discovered in tome to move for a new trial," that the judgment is void, or any other reason justifying relief from the operation of the judgment. The defendant's motion is timely.

This case involved a challenge by the plaintiff to an action of a federal agency under 5 U.S.C. § 558(c), part of the Administrative Procedures Act, and related regulations. The plaintiff challenged the procedures used by the United States Forest Service which led to the revocation of two permits held by the plaintiff. One of the permits allowed the plaintiff to operate a lodge and resort on the White River National Forest. This operation was known as Trappers Lake Lodge. A related permit allowed the plaintiff to operate an outfitter guide service form the lodge. In my order [# 24], filed October 19, 2005, I set aside the Forest Service's Notice of Revocation concerning the plaintiff's permits because the Forest Service had not followed certain procedures required by law.

On October 7, 2005, twelve days before my order was issued, the plaintiff closed the sale of its property

at Trappers Lake Lodge. The sale of the plaintiff's Trappers Lake Lodge property caused its permits to be terminated by operation of law. 36 C.F.R. § 251.59. Once the plaintiff's permits were so terminated, a decision by this court finding that the Forest Service's revocation of those permits was procedurally improper could not have an effect on the rights of the litigants in this case. Under the APA, the plaintiff cannot assert a claim for damages based on the revocation of its permits. *Plaintiff's response* [# 30], filed November 18, 2005, p. 8, n. 3.

Under these circumstances, this case became moot shortly before I entered my October 19, 2005, order. After the termination of the permits, my order could not affect the behavior of the defendant toward the plaintiff because the permits in question no longer were in effect. ***See, e.g., Wirsching v. Colorado,*** 360 F.3d 1191, 1196 (10th Cir.2004). After the sale of the plaintiff's Trappers Lake Lodge property, my order amounted to nothing more than a declaration that the plaintiff had been wronged by the defendant. Such a declaration, however, can have no affect on the legal relations of the parties.

Based on the arguments advanced and the authorities cited by the defendants, I conclude that this case became moot shortly before I entered my October 19, 2005, order. I conclude that the plaintiff's arguments to the contrary are unavailing.

THEREFORE, IT IS ORDERED as follows:

1. That under FED.R.CIV.P. 60, the court's judgment [# 25], filed October 20, 2005, is **VACATED;** and

2. That the plaintiff's complaint and this action are **DISMISSED** because they are moot.

Dated September 5, 2006, at Denver, Colorado.

BY THE COURT:

s/ Robert E. Blackburn
Robert E. Blackburn
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Case No. 04-cv-2314-REB-BNB

[Filed October 19, 2005]

R.M. INVESTMENT CO., d/b/a TRAPPERS LAKE LODGE & RESORT,	)
Plaintiff,	)
v.	)
UNITED STATES FOREST SERVICE, and DON G. CARROLL, in his official capacity as White River National Forest Supervisor,	)
Defendants.	)

ORDER SETTING ASIDE AGENCY ACTION

Blackburn, J.

This matter is before me on the plaintiff's appeal of an administrative action taken by the United States Forest Service. The action challenged is the Forest Service's revocation of the plaintiff's permits to operate

a lodge and an outfitting/guide service. The matter is fully briefed, obviating the necessity for further argument. The administrative record contains numerous consecutively numbered pages, to which I will refer by their page number (e.g., AR 0001). I find and conclude that the Forest Service's revocation of the plaintiff's permits must be set aside.

I. JURISDICTION

The plaintiff challenges the action of a federal agency under the 5 U.S.C. § 558(c), part of the Administrative Procedures Act, and related regulations. I have jurisdiction over this case under 28 U.S.C. § 1331 and 5 U.S.C. §§ 702-706.

II. FACTS

The plaintiff operated an enterprise known as Trappers Lake Lodge and Resort on land regulated by the Forest Service. Trappers operated the lodge under a twenty year term special use permit issued by the Forest Service (Lodge Permit). Trappers' outfitter-guide activities operated under a special use commercial outfitter guide permit issued by the Forest Service (Guide Permit). At the relevant times, Daniel Stogsdill was the president and chairman of the board of Trappers.

2003 Notice - On June 20, 2003, the Forest Service issued a Notice of Noncompliance to Trappers (2003 Notice). AR 110-112. The 2003 Notice indicated that the Forest Service had concluded that Trappers was in violation of Clause 7 and Clause 42 of its Lodge Permit. Clause 7 required Trappers to comply with

the regulations of the Department of Agriculture, and all federal, state, county, and municipal laws. *Id.* Clause 42 indicated that the sale of liquor was allowed under the permit. *Id.* However, the forest officer in charge could order the discontinuance of liquor sales if liquor sales caused the development of undesirable conditions. Further, the clause prohibited the provision of liquor to a visibly intoxicated person, whether customer or employee. The 2003 Notice also cited provisions of the Guide Permit, which the Forest Service found Trappers had violated. *Id.* These violations generally are not relevant to the issues in this case. It should be noted, however, that possession of first aid cards by employees, and the availability of first aid kits in various circumstances, were among the issues raised concerning the Guide Permit.

The 2003 Notice indicated that Trappers must cure its noncompliance by July 21, 2003, by taking three steps:

> 1. Take any and all necessary steps to assure the immediate cessation of all illegal drug and excessive alcohol usage at the lodge by all lode and outfitting/guiding employees, and submit a written explanation of the steps you have taken.
>
> 2. In writing, explain how you plan to deter drug and excessive alcohol use by employees in the future.
>
> 3. In writing, submit your plan to assure first aid kits will be included with gear taken on all day trips as well as present in all camps.

Id. The 2003 Notice concluded with the following statement:

> Should there be any future recurrence of the above-described permit violations, action may be taken to immediately suspend or revoke both your Special Use Lodge Permit and your Special Use Outfitter/Guide Permit. Additionally, any further complaints and/or reports of illegal substance abuse or excessive alcohol use which could result in putting an employee, client or any other person in harms way, could result in immediate suspension of one or both of your special use permits (36 CFR 251.60(f)).

Id.

Trappers' Response - Three days later, on June 23, 2003, Trappers submitted a written response to the Forest Service. AR 113-118. The response disputed some of the factual claims described in the 2003 Notice, and described how Trappers had addressed certain incidents described in the 2003 Notice, based on Trappers' understanding of the facts. In its response Trappers reviewed its policies concerning employee drug and alcohol use, possession of weapons, and possession and use of first aid kits, and its practices designed to enforce those policies. The Forest Service never replied, in writing or otherwise, to Trappers' June 23, 2003, written response.

Suspension Notice - On May 26, 2004, the Forest Service issued to Trappers a Notice of Immediate Suspension (Suspension Notice). AR 119. The Suspension Notice concerned both the Lodge Permit

and the Guide Permit. Quoting 36 C.F.R. § 251.60(f), the notice indicated that "(i)mmediate suspension of a special use authorization, in whole or in part, may be required when the authorized officer deems it necessary to protect the public health or safety or the environment." *Id.* The Notice continued, "(m)y staff and law enforcement officials have informed me there is an immediate concern for environmental and public safety which warrants this decision." *Id.*

2004 Notice - On June 7, 2004. the Forest Service issued Trappers a Notice of Non-Compliance and Opportunity to Cure (2004 Notice). AR 120-124. The 2004 Notice addressed a variety of issues that the Forest Service had noted in a recent inspection. These issues concerned fuel storage and fuel spills, as well as the condition of various buildings used by the lodge. *Id.* In addition, the 2004 Notice described flaws in the water system and sanitation in the bar and restaurant. *Id.* The 2004 Notice did not address drug or alcohol use by Trappers' employees. The 2004 Notice provided that Trappers would have until August 15, 2004, to cure its non-compliance. AR - 120.

Revocation Notice - On June 15, 2004, the Forest Service issued a Notice of Revocation to Trappers (Revocation Notice). AR 160-163. The Revocation Notice noted that Trappers was in violation of Clause 7 of its special use authorization, which requires compliance with Department of Agriculture regulations, and all federal, state, county and municipal laws, ordinances, or regulations. The same clause was cited in the 2003 Notice. The Revocation Notice also cited Clause 39, which concerned the Trappers' inspection and removal of hazards, and

protection of public safety, health, and welfare. Clause 39 was not cited in the 2003 Notice. The Revocation Notice also cited specific terms of the lodge operating plan, which terms were not cited in the 2003 Notice.

The series of notices summarized above were outlined in the Notice of Revocation. The Notice of Revocation then states that "in addition to the June 7, 2004 Notice of Noncompliance and Opportunity to Cure, it has come my attention that other violations with the terms and conditions of your special use authorization have taken place." AR 162. The notice then outlines the arrests of five Trappers employees which had occurred between April 25, 2004 and June 15, 2004, the date of the Notice of Revocation. The Notice of Revocation continued:

> The actions leading to these arrests may have resulted in putting innocent individuals, guests, or children in harms way. Therefore, you have failed to comply with, or cure, the June 20, 2003, Notice of Noncompliance and Opportunity to Cure. Additionally, it is my determination that the above referenced situation places your operation in violation of Clauses 7, 39, and 48.
>
> Accordingly, pursuant to Clause 15 which states, "This permit may be revoked upon breach of any conditions herein," I hereby revoke both the special use authorization issued to (Trappers) dated May 9, 1990, for the purpose of operating and maintaining a resort and related facilities and the associated outfitter guide special use permit dated July 20, 2000.

AR 162-163. This was the first indication Trappers received from the Forest Service that its response to the 2003 Notice was not considered adequate to meet the cure requirement stated in the 2003 Notice.

Appeal - Trappers appealed the revocation to the Deputy Regional Forester, as allowed under applicable law. The Deputy Regional Forester upheld the revocation. The Deputy Regional Forester noted the 2003 Notice, and summarized alcohol and drug related "complaints and reports" involving Trappers' employees after the 2003 Notice and before the Notice of Revocation. Referring to these incidents, the Deputy Regional Forester concluded that these

> reports document continuation of unacceptable conduct by (Trappers) employees, for which the holder was given notice in June 2003. The submittal of a written plan to address the problem does not satisfy (Trappers') obligation to correct the problem. I affirm the Forest Supervisor's conclusion that the response to the notice of noncompliance (2003 Notice) was insufficient and therefore ground for revocation.

AR 304. The Deputy Regional Forester concluded also that continued alcohol and drug related complaints and reports after the Notice of Revocation evidenced an ongoing threat to public health and safety, which justified the Notice of Suspension that was issued before the Notice of Revocation. *Id.* The propriety of the Notice of Suspension is not at issue here.

III. PROCEDURAL REQUIREMENTS

By statute and regulation, certain procedural requirements are applicable to the suspension and revocation of Trappers' permits. 5 U.S.C. § 558(c) provides, in relevant part:

> Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given–
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

The Forest Service's termination, revocation, or suspension of special use permits is controlled by 36 C.F.R. § 251.60. This regulation gives the Forest Service broad authority to revoke or suspend a special use authorization "[f]or noncompliance with applicable statutes, regulations or the terms or conditions of the authorization" or "[a]t the discretion of the authorized officer for specific and compelling reasons in the public interest." 36 C.F.R. § 251.60(a)(2)(i)(A), (D). Subsections (e) and (f) of the regulation provide procedures for suspension and revocation:

> (e) Except when immediate suspension pursuant to paragraph (f) of this section is indicated, the authorized officer shall give the

> holder written notice of the grounds for suspension or revocation under paragraph (a) of this section and reasonable time to cure any noncompliance, prior to suspension or revocation pursuant to paragraph (a) of this section,
>
> (f) Immediate suspension of a special use authorization, in whole or in part, may be required when the authorized officer deems it necessary to protect the public health or safety or the environment. In any such case, within 48 hours of a request of the holder, the superior of the authorized officer shall arrange for an on-site review of the adverse conditions with the holder. Following this review, the superior officer shall take prompt action to affirm, modify, or cancel the suspension.

36 C.F.R. § 251.60(e), (f). Reading these subsections together, I conclude that revocation without proper notice and opportunity to cure is not permissible.

IV. DEVIATION FROM PROCEDURAL REQUIREMENTS

If an agency action is found to be "without observance of the procedure required by law," then the court must set aside the action as unlawful. 5 U.S.C. § 706(2)(D). Trappers argues that the Forest Service violated the procedural requirements of § 251.60(e) because the Forest Service revoked Trappers' permits without giving Trappers adequate notice and an opportunity to cure, as required by the regulation. The Forest Service claims it gave Trappers adequate notice

and opportunity to cure before it revoked Trappers' permits.

The Forest Service argues that the 2003 Notice, concerning employee drug use and alcohol abuse, gave Trappers' ample notice of these problems, and ample opportunity to cure the problems. The Forest Service notes that as of May, 2004, there were continuing problems with Trappers' employees using drugs and abusing alcohol, which led to related problems. According to the Forest Service, the continuing problems in 2004 demonstrate that Trappers' had not adequately cured the violations noticed in the 2003 Notice, and revocation thus was proper under the regulation.

Trappers says the life of the 2003 Notice cannot properly be extended to May 2004, as a basis for revoking Trappers' permits. The 2003 Notice, Trappers notes, provided a cure deadline of July 21, 2003, and specific steps Trappers must take by that date. Trappers gave the Forest Service a written response before the cure deadline outlining the steps it had taken, and its plans and policies designed to address use of illegal drugs and alcohol abuse by its employees. The Forest Service never replied to Trappers' written response, and never indicated to Trappers that it had not satisfactorily cured the violations noted in the 2003 Notice prior to the cure deadline of July 21, 2003.

The applicable statute and regulation do not define the lifetime of a notice and opportunity to cure. The relevant cases do not provide such a definition either. However, it is clear that the concept of notice and an

opportunity to cure is intended to give a permit holder "an opportunity for the correction of conduct questioned by the agency" before a permit is revoked. ***Gallagher & Ascher Co. v. Simon***, 687 F.2d 1067, 1074 (7th Cir. 1982). Stated differently, notice and an opportunity to cure is intended to prevent unreasonable or unfair surprise to a permit holder before its permit is revoked.

Under the circumstances of this case, I conclude that the effect of the 2003 Notice cannot properly be extended to May, 2004. Trappers' June 23, 2003, written response to the 2003 Notice addressed each of the three steps outlined in the 2003 Notice. The 2003 Notice indicates that those three steps were required to cure Trappers' noncompliance. Absent some indication from the Forest Service that Trappers was required to do more than was described in Trappers' June 23, 2003, response, Trappers concluded reasonably that it had cured its noncompliance prior to the Forest Service's July 21, 2003, cure deadline. Given this reasonable conclusion, the Forest Service could not rely on future violations of a similar type as a basis for immediate revocation of Trappers' permits. Rather, the Forest Service was required to again comply with the minimally burdensome requirement of notifying Trappers of the nature of its violations, and giving Trappers at least a short time to cure the violations.

If Trappers' cure was inadequate, or if the Forest Service chose to reserve judgment on the adequacy of Trappers' cure, the Forest Service was required to notify Trappers of these circumstances. Under the notice and opportunity to cure scheme created by the

relevant statute and regulation, the Forest Service cannot remain mute about a permit holder's facially reasonable cure, implying that the cure is adequate, and then effectively lay in wait for another similar violation as a basis for revocation without notice. Such a procedure eviscerates the purpose of the statutory and regulatory scheme to provide a permit holder "an opportunity for the correction of conduct questioned by the agency" before a permit is revoked. ***Gallagher & Ascher Co.***, 687 F.2d at 1074. I have carefully considered the Forest Service's arguments to the contrary, and find them to be unavailing.

The Forest Service's June 15, 2004, Revocation Notice was based on the violations described in the 2003 Notice. Under the circumstances reflected in the record, Trappers concluded reasonably that those violations had been cured. Under applicable law, Trappers was entitled to another notice and an opportunity to cure prior to the revocation of its permits on June 15, 2004. Trappers was not given such notice and an opportunity to cure. The Revocation Notice, therefore, was issued without observance of the procedure required by law. Again, if an agency action is found to be "without observance of the procedure required by law," then the court must set aside the action as unlawful. 5 U.S.C. § 706(2)(D). The Forest Service's June 15, 2004, Revocation Notice must be set aside.

V. ATTORNEY FEES & COSTS

Trappers seeks an award of costs and attorney fees under 28 U.S.C. § 2412, and 5 U.S.C. § 504. I conclude that § 2412 controls these issues. Under § 2412(a)(1),

I have discretion to award costs to a party who prevails in a civil action against the United States. I conclude that costs should be awarded to the plaintiff.

Under § 2412(d)(1)(a), a court shall award fees and other expenses, in addition to costs, incurred by the prevailing party in a case such as this case. Such an award is not mandated if "the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." *Id.* The plaintiff paints the Forest Service's position in this case as outrageous. I find that the Forest Service's position is reasonable, though in the end I disagree with that position. As noted above, the applicable statute and regulation, and the relevant case law, do not define the lifetime of a notice of noncompliance and opportunity to cure. In the face of this uncertainty, the Forest Service can argue reasonably that the 2003 Notice remained effective and relevant at the time of the Revocation Notice. I conclude that attorney fees should not be awarded to the plaintiff.

VI. ORDERS

THEREFORE, IT IS ORDERED as follows:

1. That under 5 U.S.C. § 706(2), the June 15, 2004, Notice of Revocation issued by the Forest Service to Trappers (AR 160-163) is **SET ASIDE**;

2. That **JUDGMENT SHALL ENTER** in favor of the plaintiff, R.M. Investment Co., d/b/a Trappers Lake Lodge & Resort, and against the defendants, the United States Forest Service, and Don G. Carroll, in

his official capacity as White River National Forest Supervisor;

3. That the plaintiff is **AWARDED** its costs under 28 U.S.C. § 2412(a)(1);

4. That costs **SHALL BE TAXED** by the Clerk of the Court pursuant to FED. R. CIV. P. 54(d)(1) and D.C.COLO.LCivR 54.1; and

5. That the plaintiff's request for an award of attorney fees is **DENIED.**

Dated October 19, 2005, at Denver, Colorado.

BY THE COURT:

s/ Robert E. Blackburn
Robert E. Blackburn
United States District Judge

APPENDIX D

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article III, § 2 of the U.S. Constitution is set out verbatim as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
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> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to

> Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
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> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. Const. art. III, § 2.

The judicial review portion of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, is set out verbatim as follows:

> (a) This chapter applies, according to the provisions thereof, except to the extent that -
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> (1) statutes preclude judicial review; or
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> (2) agency action is committed to agency discretion by law.
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> (b) For the purpose of this chapter -
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> (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include -
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> (A) the Congress;
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> (B) the courts of the United States;
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> (C) the governments of the territories or possessions of the United States;
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> (D) the government of the District of Columbia;
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> (E) agencies composed of representatives of the parties or of representatives of

organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or section 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C. § 701 (2000).

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the

> United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702 (2000).

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. § 703 (2000).

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704 (2000).

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705 (2000).

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be -
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those

parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706 (2000).